

3 SIMPLEAIR, INC. * Civil Docket No.
4 VS. * 2:13-CV-587
* Marshall, Texas
5 * March 18, 2014
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6 GOOGLE * 1:00 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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10 PROCEEDINGS
11

12 (Jury out.)

13 COURT SECURITY OFFICER: All rise.

14 THE COURT: Be seated, please.

15 All right. Is there anything from the Plaintiff
16 or the Defendant before we bring the jury back in?

17 MR. EICHMANN: No, Your Honor.

18 MR. STOCKWELL: Your Honor, just for the record,
19 we had talked yesterday about Google filing an offer of
20 proof on the implementation by ECF instead of reciting it in
21 Court. We ECF'd that over the lunch hour, and I have copies
22 for Your Honor and the clerk, if Your Honor wishes.

23 THE COURT: If you'll hand those up.

24 MR. STOCKWELL: Thank you.

25 THE COURT: All right. If there's not anything

1 further, we'll bring in the jury, Mr. McAteer.

2 COURT SECURITY OFFICER: Yes, sir.

3 All rise for the jury.

4 (Jury in.)

5 THE COURT: Be seated, please.

6 Welcome back from lunch, ladies and gentlemen.

7 Is the Defendant prepared to call their next witness?

8 MS. AINSWORTH: Yes, Your Honor. As the next
9 witness, Google calls Dr. Ravi Dhar.

10 THE COURT: All right.

11 MS. AINSWORTH: And he has been sworn, Your Honor.

12 THE COURT: All right. If you'll come have a
13 seat, Dr. Dhar.

14 THE WITNESS: Thank you, sir.

15 (Noise.)

16 THE COURT: It was quiet the entire noon hour.

17 All right. Ms. Ainsworth, proceed.

18 MS. AINSWORTH: Thank you, Your Honor.

19 RAVI DHAR, Ph.D., DEFENDANT'S WITNESS, PREVIOUSLY SWORN

20 DIRECT EXAMINATION

21 BY MS. AINSWORTH:

22 Q. Good afternoon, Dr. Dhar.

23 A. Good afternoon.

24 Q. Could you introduce yourself to the jury, please?

25 A. Sure. My name is Ravi Dhar, and I'm a professor of

1 marketing at Yale University.

2 Q. Do you hold any other positions at Yale University?

3 A. Yes. I have what's called a secondary appointment as
4 professor of psychology at Yale University as well, and I
5 direct a center, director of the center, Yale Center for
6 Customer Insights, it's called.

7 Q. Could you tell us what the Yale Center for Customer
8 Insights is?

9 A. Sure. It was started around seven or eight years ago
10 roughly, and the idea is that academics is very rigorous,
11 but it's often not seen as very relevant to the real world.
12 And we thought how do we do rigor and relevance to work
13 jointly with companies.

14 So the mission of the center is to advance the
15 frontiers of understanding consumer behavior, and that's
16 what the center does with a lot of different companies.

17 Q. Okay. Dr. Dhar, let me ask you a little about your
18 educational background, and I might ask you to slow down
19 just a tiny bit in your answers, please.

20 Could you tell us about your education?

21 A. Sure. My undergraduate degree was in engineering back
22 in India. I also did an MBA from India, and I came to this
23 country around when I was 25 to go to graduate school. So I
24 came to University of California at Berkeley where I
25 received an MS, which is a degree you get in -- in sort of

1 on the way to getting a Ph.D. So I have an MS and Ph.D.
2 from the University of California. So those are my three
3 degrees.

4 Q. Why did you end up coming to this country -- to the
5 States?

6 A. Basically, you know, I was one of those few people who
7 wanted to do more research on understanding consumer
8 behavior. Many MBAs, really both in this country and in
9 India, go to what we call the real world. I wanted to
10 understand and do more research in the area. And U.S. is
11 the best place to do research in most -- in most fields.

12 Q. What did you do after you completed your studies?

13 A. So typically after Ph.D. many of us become professors.
14 I became an assistant professor at Yale University.

15 Q. How long have you been teaching at Yale?

16 A. I just finished my 20 years. I joined in '92 after
17 finishing my Ph.D. So 21 years, I guess.

18 Q. What courses do you teach or have you taught in the
19 past?

20 A. Sure. Over the 20 years, I've taught a lot of different
21 courses. I can give you some of the titles: Consumer
22 behavior, marketing management, marketing strategy. I also
23 taught what I call advanced courses on marketing leadership,
24 the role of a chief marketing officer. I've taught courses
25 on marketing and financial services, and then I've also

1 taught what's called courses for Ph.D., which tend to be
2 more specialized courses.

3 And my expertise is in decision-making, so I teach two
4 Ph.D. courses on judgment and decision-making.

5 Q. Do you have any areas of expertise within the field of
6 marketing?

7 A. Sure. So broadly, the area of expertise is really
8 what's called judgment decision-making, how do people
9 decide, how do people make choices. But I also study
10 branding, marketing management, marketing strategy, so I
11 have a range of sort of areas in which I've worked over the
12 last 20 years.

13 Q. Have you ever done any consumer survey work?

14 A. Yes, I have both for my academic and for my consulting
15 and litigation consulting that I do.

16 Q. And have you done consulting work with companies on
17 consumer issues?

18 A. Yes. That's my specialty, so my research is in this
19 area and the work I do with companies is also broadly in the
20 area of how do we understand consumer behavior.

21 Q. Do you have any experience with what's called conjoint
22 surveys?

23 A. Yes, I do.

24 Q. And what experience is that?

25 A. So I have taught in my master's classes and in my Ph.D.

1 classes, and also in my litigation work and consulting work
2 I have, you know, supervised surveys done for conjoint, not
3 as much as Dr. Srinivasan has done, but I'm fully
4 experienced in the technique.

5 Q. Have you published any papers in your career?

6 A. Yes. I've published over 50 papers.

7 Q. And have you received any academic honors or awards?

8 A. Yes. Over the -- the 20 years, I have won some best
9 paper awards for my research. I've -- also last year, I won
10 what's called Lifetime Research Award in the area of
11 consumer psychology.

12 Q. Are you being compensated for your time in the work that
13 you've done in this case?

14 A. Yes, I am.

15 Q. And what is your rate?

16 A. My rate is 700 per hour.

17 Q. And did you provide the parties with your resume or CV
18 that sets out all your qualifications and your papers that
19 you've written and those things?

20 A. It's part of my report. Yes.

21 Q. Okay.

22 MS. AINSWORTH: And for the record, that's at
23 Defendant's Exhibit 357.

24 Q. (By Ms. Ainsworth) Now, Dr. Dhar, shifting gears, can
25 you tell us what were you asked to do in this case?

1 A. Sure. As you heard yesterday, Dr. Srinivasan came up
2 with a number for the value of this feature. I think it's
3 around \$12.23. And what I was asked to do is really look at
4 Dr. Srinivasan's report and give my opinion on whether it
5 was valid and reliable to what Android in the marketplace
6 could charge for this feature.

7 Q. Can you describe in general terms what you did to form
8 your opinion?

9 A. Sure. So I did -- you know, I looked at
10 Dr. Srinivasan's report. I looked at his deposition
11 testimony -- testimony -- sorry. I sat yesterday in the --
12 in the courtroom and listened to his trial testimony as
13 well.

14 And he had a very complicated formula that you saw. So
15 I looked at the formula, applied that formula to some other
16 features off the formula that he had. And in addition, what
17 I did is I looked at websites of companies that sell
18 smartphones. I wanted to look how much do they talk about
19 notification according to the website.

20 I also went to what's called third-party websites or
21 third-party organizations. They don't have to be websites.
22 They could be consumer reports, and I wanted to see do those
23 places talk about notification; and in particular, do they
24 talk about battery life, infringing technology.

25 So I just wanted to see what consumers might see in the

1 process of making a smartphone purchase decision.

2 Q. What did Dr. Srinivasan estimate to be the market's
3 willingness to pay for Google's messaging service?

4 A. So he had a lot of different numbers, but, roughly, I
5 think one of the numbers he had was \$12.23 as the value for
6 this feature. What that means is if the phone is sold with
7 this feature, it will charge or it can obtain \$12.23 more
8 than a phone without that feature.

9 Q. And did he have an opinion also on if that feature were
10 available at that price, what percentage of Android users
11 would purchase it?

12 A. Yes, he did. I think it was around 42 percent, if I
13 remember correctly.

14 Q. Now, do you have any opinion about these estimates by
15 Dr. Srinivasan?

16 A. I do.

17 Q. And what is your opinion?

18 A. So my opinion is that Dr. Srinivasan is a fine academic,
19 and he did an academic exercise. I don't think it's
20 relevant to the marketplace of how people buying the
21 smartphones. And I want to talk a little bit about that.

22 Q. And did you prepare a slide that sets out a summary of
23 your opinions?

24 A. I did.

25 MS. AINSWORTH: And if -- Mr. Barnes, if we could

1 put up Slide 2.

2 Q. (By Ms. Ainsworth) Dr. Dhar, let me point you to the
3 slide that's on the screen. And could you tell the jury
4 briefly what your three major opinions are in this case?

5 A. Sure. So there are essentially three reasons why I
6 think this was an academic exercise. The first reason is
7 that Dr. Srinivasan's formula, what was called Formula 14
8 yesterday, fails to consider competition. What we know is
9 that competition drives down prices. And so if you had
10 competition in the marketplace, that number would be far
11 lower. That's the first reason.

12 The second reason is really related to -- I mentioned
13 earlier I went to the websites to look at do the companies
14 talk about notification. And I looked at the third-party
15 reviews. So what -- the second point is really about how do
16 people buy smartphones. And a smartphone has over a hundred
17 features.

18 And consumer psychology shows when a product has
19 hundreds of features or more than a hundred features, you
20 don't consider all the features when you buy a phone. Most
21 of us would look at several -- you know, subset of features.
22 Is it an Apple? Do I like the design? You know, all that
23 kind of stuff, WiFi.

24 And so my point is, when you look at it in the real
25 world there's a hundred features, you would not be likely to

1 consider notification when you buy a phone. And so what's
2 important here is the following: If you don't consider a
3 feature when you're buying the phone, then it has zero value
4 for the consumer at that time.

5 So my point here is the following: When you're buying
6 a phone with lots of features, you're unlikely to consider
7 notification, and as a result, notification and choice will
8 have very little value for people.

9 Q. What was the third opinion?

10 A. Oh, I just want to finish that opinion a little bit.

11 The second sort of issue is that not only do people have
12 to be aware of notification, they also have to be aware of
13 that this infringing technology is better for battery life.
14 If they don't know that, how do they know what the
15 difference is between one way of notification and another
16 way of notification if nobody tells them this is better for
17 battery life.

18 I never saw any communication advertising -- or
19 website -- which talks about that this technology is better
20 for battery life. Yes, it is better for battery life. I
21 think this -- I mean, maybe the lawyers have a dispute about
22 that, but I take it that it's better for battery life.
23 But if I as a shopper don't know that, it will never enter
24 into my value for the phone, because I don't know if one way
25 of notification is better than another way of notification.

1 Q. And what's your third opinion, Dr. Dhar?

2 A. So the third opinion is really, you know, if I think
3 notification is not considered when making a choice, why
4 does it appear that in Dr. Srinivasan's survey, consumers do
5 assign or respondents do assign some experience to
6 notification.

7 And the reason for that is Dr. Srinivasan's survey had
8 two flaws. One is a survey methodology. We'll talk about
9 that a little later. And second, some of the instructions
10 that he gave are officially increased the importance of
11 notification. And I think I'll explain that a little bit
12 more.

13 Q. Okay. So going back to the first point that you talked
14 about a minute ago, was that the Plaintiff's formula for
15 market willingness to pay failed to consider competition,
16 you said.

17 Why do you say that?

18 A. Well, I think Dr. Srinivasan himself testified yesterday
19 he does not take into account competition.

20 Q. Okay. Can you explain what you mean by a competitive
21 response?

22 A. Sure. In general, in the marketplace, every action has
23 a reaction. If one company does something, other companies
24 respond in other ways, and competition tends to bring down
25 the price that you can charge for things.

1 Q. If he didn't take that into account, why is that a
2 problem with regard to his conclusions?

3 A. Because as I said, competition tends to drive down
4 prices, so the number that you'll have will be inflated.

5 Q. Can you give any example of how competition changes what
6 companies can charge for a feature or a product or a
7 service?

8 A. Sure. It's all the time. I mean, I state when you go
9 to a cafe, several years ago, I would have to pay for using
10 the WiFi, or a hotel would charge me 10 or \$15. Now, many
11 of the hotels I stay in, the WiFi has become free. In cafes
12 it has become free because all the cafes have WiFi.

13 If you look at newspapers, we know all over that
14 newspapers are having a very hard time charging for
15 newspapers online, but they can charge for newspapers
16 offline. But they have less competition, because you can be
17 a local newspaper in a town, but when you go online, you're
18 competing with all the newspapers. Competition is based on
19 prices.

20 THE COURT: I'm going to ask you to slow down
21 a little bit, please, Dr. Dhar.

22 THE WITNESS: Thank you, sir.

23 THE COURT: And, Counsel, approach the bench,
24 please.

25 MS. AINSWORTH: Yes, Your Honor.

1 (Bench conference.)

2 THE COURT: Dr. Williams -- I've not excused
3 anybody. Has he left or is he still here?

4 MR. STOCKWELL: I believe he was having lunch over
5 at our offices.

6 THE COURT: I just want you to understand that
7 witnesses are not excused until the -- the Court excuses
8 them.

9 MR. STOCKWELL: Yes, I will.

10 MS. AINSWORTH: Yes, Your Honor.

11 (Bench conference concluded.)

12 THE COURT: All right. Let's continue.

13 MS. AINSWORTH: Thank you, Your Honor.

14 Q. (By Ms. Ainsworth) So just to finish this point, Dr.
15 Dhar, according to Dr. Srinivasan, about 42 percent of
16 current Android users would pay \$12.23 for Google's
17 messaging system, if they have the option to purchase that
18 feature.

19 What effect, if any, does competition have on that
20 conclusion?

21 A. So as I said, competition tends to drive down prices.
22 So that number would be lower.

23 Q. Now, going to the second reason that we talked about,
24 why do you say that people in the marketplace are unlikely
25 to consider notifications when they buy a smartphone?

1 A. So as I mentioned, a smartphone typically has more than
2 a hundred features. And I also looked at what companies of
3 smartphone -- what kind of features do they talk about,
4 whether it's companies' websites or third-party reviews. So
5 I looked at both.

6 Q. What work have you done to come to this conclusion that
7 smartphones have so many features? You mentioned roughly a
8 hundred features.

9 A. So what I did is I did a systemic search of many
10 different companies' websites, leading smartphones. I also
11 did a review of third-party -- I -- there are many
12 third-party reviews. So what I did, I typed in Google like
13 different types of key words: Best smartphone reviews, and
14 I had a year like 2012, 2013, and so forth.

15 And I kind of looked at the 53 reviews, I think, at the
16 end, because it's just endless you can do. So I looked at
17 the most -- you know, the ones that came out on top, and I
18 looked at the top 10 leading reviews.

19 Q. Did you prepare a slide that showed what you found about
20 the -- the number of features that are available in the
21 marketplace?

22 A. Yes, I did.

23 Q. Now, I know that the type is a little small on here, but
24 can you tell the jury what this slide shows?

25 A. So first, I want to start off with I also looked at the

1 websites I mentioned of the companies that sell the
2 smartphones. And I found no mention of notification in
3 those.

4 Then I went to -- what the slide shows is the review
5 that I did basically be counted up, you know, how many times
6 a different feature was mentioned. And so this is just an
7 example of like if you look at the -- if you look, the
8 operating system was mentioned 746 times. The carrier was
9 mentioned 786 times. And if you look at notifications, it
10 was mentioned 7 times.

11 And this is any mention of notification, not about
12 infringing technology. Just the word notification was
13 mentioned 7 times.

14 Q. And, Dr. Dhar, the fact that notifications were
15 mentioned 7 times that you saw in the literature --

16 A. Right.

17 Q. -- versus some of the other features such as operating
18 system, brand, carrier being mentioned in the hundreds of
19 times, what does that tell you about whether consumers are
20 considering notification when they buy a smartphone?

21 A. Sure. So I don't have a direct measure of how important
22 each of this feature is, so I'm using a proxy of how many
23 times does the people talk about it; does that tell me
24 something's important or not.

25 And what this tells me is that, first of all, there are

1 many features. So as I said, consumer psychology says when
2 you buy something and the product has a hundred features,
3 you don't think about all of them. You just think about a
4 few of them and buy.

5 And what this tells me is that it's highly unlikely
6 that most consumers will think about notification in
7 considering a smartphone purchase.

8 Q. Now, when Dr. Srinivasan testified yesterday, he
9 explained that in his survey, he had a system where the
10 participant could adjust the numbers, and they could assign
11 a zero value to some features, for instance, notification.

12 Does -- the fact that you could potentially assign a
13 zero, does that address your concern here?

14 A. It doesn't because his survey methodology and
15 instructions were biased.

16 Q. Okay. We'll -- let's talk about the survey in a minute.
17 But have you seen any evidence that consumers are aware of a
18 connection between notifications and battery life?

19 A. No. As I mentioned earlier, I haven't seen anything
20 that a consumer is aware that the infringing technology is
21 better for your battery life. I haven't seen anything
22 there.

23 Q. Okay. Now, let's talk about the survey structure, Dr.
24 Srinivasan (sic), which was your third point. I believe you
25 testified that Dr. Srinivasan's survey exaggerated the value

1 of notification in comparison to the other features that he
2 tested.

3 Why do you believe that?

4 A. So there are two reasons for this. One reason relates
5 to the survey methodology that he used, and the second
6 reason relates to the leading instructions. I can explain
7 on both, if you'd like.

8 Q. Well, let's -- let's look at -- at the next slide, which
9 I believe is a screenshot from the survey that Dr.
10 Srinivasan gave to the participants, and this shows his
11 instructions.

12 What is it in his instructions that you believe
13 exaggerates notification?

14 A. Sure. Before I go to his instruction, I want to talk a
15 little bit about the survey methodology, and then I'll come
16 down to the instructions.

17 THE COURT: Let me interrupt, Dr. Dhar. I know
18 you have a story to tell, but you're here to answer the
19 questions that are asked and not to launch into something
20 else that you thought of that you want to talk about.

21 So you're here to respond to counsels' questions,
22 and they'll certainly have a full opportunity to ask you all
23 the questions that they want to, but you're limited in your
24 responses to the questions asked.

25 THE WITNESS: Thank you.

1 THE COURT: Do you understand?

2 THE WITNESS: I'm sorry.

3 THE COURT: Okay. Let's continue, Counsel.

4 Q. (By Ms. Ainsworth) So, Dr. Dhar, in the survey
5 instructions, what is it that makes you believe that the
6 instructions exaggerated the importance of notifications?

7 A. Sure. If you look at the highlighted portion, that is
8 part of the instructions in the survey. And I want to point
9 your attention to the second sentence, which says: During
10 the next few screens, you'll be asked to rate the importance
11 to you of different attributes and the -- that previous
12 research has identified as important in choosing a
13 smartphone.

14 So basically, the respondents in the survey were told
15 that all the 16 attributes of features that are included but
16 important in choosing a smartphone, and that's considered
17 leading because now I've already told you this is important.

18 So in theory, while I allow you to or Dr. Srinivasan
19 allows you to assign a zero value, it's unlikely that you
20 will do that after you've been told it's important. Some
21 will, but many will sort of get influenced by the
22 instructions.

23 Q. Okay. And if we could look at the next slide, which is
24 also a screenshot that shows on the left the 16 features
25 that Dr. Srinivasan tested.

1 What about these survey instructions where he describes
2 a notification issue gives you a concern?

3 A. Sure. So if you look at the 16 features, you will
4 notice that only 5 of them, I think, have some explanation
5 and have sort of more descriptions and details. And one of
6 them happens to be the notification. It also happens to be
7 the longest explanation in detail.

8 And so what we know from research is when you do that,
9 it draws attention, makes people think it's more important.
10 It also gives me an understanding -- I may not have an
11 understanding of what notification is. And now it tells me,
12 oh, I can use it for different things. So all of that
13 enhances the importance of notification in the survey
14 compared to in the real world.

15 Q. Now, Dr. Dhar, moving on from the way that his survey
16 was structured, did you do any work to determine the
17 validity of Dr. Srinivasan's formula to determine market
18 willingness to pay?

19 A. So as I mentioned earlier, I took his formula and I
20 applied it to the other features that Dr. Srinivasan had in
21 his report or in his survey.

22 Q. Okay. And let's look at the next slide.

23 Does this show what happens if you -- when you took the
24 Formula 14 and -- and applied it to another feature, which
25 was WiFi, what happened then?

1 A. So basically, I took Dr. Srinivasan's formula and
2 applied it to WiFi, and what the formula suggests is that
3 the feature WiFi is worth around \$300, just that feature
4 alone.

5 Q. Now, do you think that that is a valid result?

6 A. It's not valid of what the feature's worth is in the
7 marketplace, because the phone costs around 150, \$200, many
8 phones.

9 Q. Now, you were here yesterday when Dr. Srinivasan
10 testified, right?

11 A. Yes.

12 Q. And did you hear that -- that he objected to the way
13 that you used his Formula 14 to apply it to other features?
14 Do you have any response to that?

15 A. So my understanding is that Dr. Srinivasan objects that
16 I have used it and applied it to a feature that what he
17 calls his large importance in the overall decision to
18 purchase.

19 And it should be used only for small changes, so I also
20 applied it to smaller changes.

21 Q. And do you have a slide that shows applying it to small
22 changes?

23 A. Correct.

24 MS. AINSWORTH: And if we can show the next slide.

25 Q. (By Ms. Ainsworth) What -- can you explain what

1 happened when you took the Formula 14 and applied it to
2 a half-inch change in the screen size of a phone? What
3 did you find?

4 A. So the -- just to explain the numbers there, the
5 different numbers, which says how much people are willing to
6 pay for each change in the screen size. And so when I
7 applied it to change in screen size from 2.4 inches to 3.2
8 inches, I get \$83.

9 Q. Okay. And did you consider a change in size of a half
10 inch on screen size to be a small change in the size a
11 feature?

12 A. Well, it's apparently not small enough for Dr.
13 Srinivasan, because he kept -- first, he said two -- you
14 know, this was okay; subsequently, he said this is not okay.

15 Q. So in your calculations, were you able to take Formula
16 14 and make it work and come up with a type of results that
17 Dr. Srinivasan did, or did you come up with illogical
18 results?

19 A. I don't think -- I didn't see Dr. Srinivasan -- Dr.
20 Srinivasan apply it to other features, so I -- when I
21 applied it to it, I got this different prices.

22 Q. So let's -- last, let's set aside trying to actually use
23 Formula 14 and just think about what this means using common
24 sense. If the market is willing to pay \$12.23 for
25 notifications, which that feature Dr. Srinivasan ranked next

1 to last of the 16 that he tested, what does that mean for
2 all those other features, the -- the 15 above that -- or the
3 14 above that?

4 A. Sure. So Dr. Srinivasan's survey had 16 features, and
5 the 15th ranked was around \$12.23. So by definition, that
6 means all the other features ranked higher than notification
7 would have been valued at more than \$12.23.

8 Q. But how many various features did you find in the
9 literature that there are in the average smartphone?

10 A. Over a hundred features.

11 Q. So if -- if one that was pretty far down the list, he
12 says the market would be willing to pay \$12.23, what does
13 that mean for all these other features? What would that do
14 for the cost of phone?

15 A. Well, it would be much more than what the market price
16 for the phone is.

17 Q. So to summarize, Dr. Dhar, if we could go to your last
18 slide again, go to your ultimate conclusions about Dr.
19 Srinivasan's estimates of the market's willingness to pay.

20 A. So my conclusion is -- the three reasons why the \$12.23
21 estimate I don't think is valid of what we find in the
22 marketplace. One is, it doesn't take into account
23 competition, and competition can drive prices down. It can
24 drive them all the way to zero sometimes over marginal
25 costs, what economists say.

1 The second is, are consumers aware or can take into
2 account notification when they buy a phone, because even if
3 the feature has some value, if that is not something I
4 consider when I buy a phone, that means in the pricing of
5 the phone it has zero value.

6 And the third is sort of trying to understand why if it
7 has zero value, I'm trying to reconcile why it might have
8 shown some experience in Dr. Srinivasan's survey. And part
9 of the reason is related to the methodology and the
10 instructions that in my opinion advised.

11 MS. AINSWORTH: And for the record, the exhibit
12 which sets out Dr. Dhar's summary of his opinions is
13 Exhibit 484.

14 And with that, I'll pass the witness, Your Honor.

15 THE COURT: Cross-examination by the Plaintiff?
16 You may proceed, Mr. Eichmann.

17 MR. EICHMANN: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. EICHMANN:

20 Q. Good afternoon, sir.

21 A. Good afternoon.

22 Q. I'll ask you as well to try to keep it a little bit
23 slower in your speech, because I'm not sure I can keep up
24 with you as well.

25 Now, the first point that you raised in your

1 presentation was this issue of competition, right?

2 A. Correct.

3 Q. You understand, sir, that Google has competition in the
4 Android smartphone -- excuse me -- Google has competition in
5 the smartphone marketplace, right?

6 A. You mean in terms of different company? Apple operating
7 system? Are you talking about Google operating system?

8 Q. Google has other competitors in the smartphone industry,
9 right?

10 A. Yes. They're competitors in the smartphone industry.

11 Q. Apple, BlackBerry, Microsoft, they all are competitors
12 of Google when it comes to smartphone operating systems,
13 correct?

14 A. Correct.

15 Q. And you understand, sir, that each of those companies,
16 all the competition by Google has actually taken a license
17 to SimpleAir's patent on notifications, right?

18 A. I understood that yesterday. Yes.

19 Q. That's not something that you knew when you were
20 preparing your report, is it?

21 A. I might have known that. Yeah, I think I knew that
22 there was -- I had seen some previous report. Yes.

23 Q. You didn't talk about how all these competitors licensed
24 the notification technology when you prepared and submitted
25 your report, right?

1 A. That was not relevant. My point is that competition
2 drives down prices. So I'm not sure what the question is
3 here.

4 Q. Sir, one way in which competition can drive down a price
5 would be reflected by how each of these competitors doesn't
6 charge for their notification services, right?

7 A. One way competition can reflect is by not charging for
8 notification.

9 Q. You understand, sir, that each of the companies that
10 have smartphone operating systems -- Microsoft, BlackBerry,
11 Apple, and Google -- they don't charge for the
12 notifications, right?

13 A. Correct.

14 Q. But that doesn't mean that they don't get value from it,
15 right?

16 A. They don't get value from purchase. There can be other
17 ways of getting value, sure.

18 Q. Now, Dr. Srinivasan testified earlier this week, and you
19 were here for his testimony?

20 A. Yes.

21 Q. And you've reviewed his work in this case, right?

22 A. Correct.

23 Q. Dr. Srinivasan submitted not just one but two reports in
24 this case?

25 A. Correct.

1 Q. And he provides his analysis on what the market is
2 willing to pay for the infringing notification service,
3 right?

4 A. Correct.

5 Q. He provides very specific estimates that fall within the
6 parameters of what would be reasonable in his view?

7 A. I'm not sure what you're asking when you said I disagree
8 with his number. So how can I agree with the parameters
9 that he provided on that number.

10 Q. Dr. Srinivasan provides estimates of what he believes
11 the market is willing to pay for the Android notification
12 service?

13 A. Yes.

14 Q. And he also provides opinions on how many users out
15 there would actually pay for the notification service if
16 they were asked to pay for it directly, right?

17 A. Correct.

18 Q. That's these numbers on the board --

19 A. Correct.

20 Q. -- 12 -- please just let me finish just for the
21 reporter. 12.23 and then 42.2 percent.

22 A. Correct.

23 Q. And now, in response to Dr. Srinivasan's report, you
24 were asked to perform your own work, right?

25 A. Which was to, you know, as I mentioned to -- to look at

1 Dr. Srinivasan's work. Yes.

2 Q. And as you point out in your slide, you offer a critique
3 of Dr. Srinivasan, right?

4 A. Correct.

5 Q. That's what Google asked you to do?

6 A. That's what the counsel asked me to do, yes.

7 Q. They didn't ask you to go out and perform your own
8 survey, right?

9 A. They did not ask me to do that.

10 Q. And you didn't actually go out and perform your own
11 survey of smartphone users?

12 A. Well, I looked at the other research, but what I think
13 when you're referring to survey, did you mean whether I did
14 my own calculation of price? Is that -- because I looked at
15 the other survey of websites. I don't think -- I think
16 you're referring to survey as similar to what Dr. Srinivasan
17 did.

18 Q. Well, in your field of business, survey refers to going
19 out and actually talking to consumers, right?

20 A. That's right. I didn't do that.

21 Q. You didn't talk to any consumers in the smartphone
22 industry to hear for yourself what they had to say about
23 notifications, did you?

24 A. That would be a biased way to do it. I didn't do that.

25 Q. Now, sir, if the jury wants to know what your numbers

1 are, what numbers you think are relevant instead of Dr.
2 Srinivasan's, you don't have any other alternative numbers
3 for them, do you?

4 A. So I tell the jury what I told in my deposition. I
5 think the number is a lot lower, between 0 or a little more
6 than non-0 and \$12.23. I don't have a number; that is
7 correct. But I have the reasons that is I provided to you
8 why I think the number is a lot lower. And then, you know,
9 other experts might have numbers that will be -- you know,
10 we can look at, but I don't have a number. That's correct.

11 Q. Sir, I just want to bring you back to that question.
12 You do not have a number to present to the jury in response
13 to Dr. Srinivasan's numbers, do you?

14 A. Correct.

15 Q. And is that because you didn't have enough time to
16 perform a survey?

17 A. Among other reasons.

18 Q. Oh, so you do contend you didn't have enough time to
19 perform a survey?

20 A. That was one of the reasons I gave. Yes.

21 Q. Well, Dr. Srinivasan performed his survey in February of
22 2012, right?

23 A. I don't remember, but I know the survey was done -- you
24 know, it's the same survey done as was mentioned yesterday
25 for other cases. So that might be correct, yeah.

1 Q. And today, we're in March of 2014?

2 A. Yes, that's correct.

3 Q. Did Google at any point in those last two years conduct
4 its own survey of smartphone users so that they could come
5 here and present different numbers to the jury?

6 A. Well, as I said in my deposition, I'm actually skeptical
7 a survey can be done in this case, and I'm sure that Google
8 would present other information of what can be done. I
9 mentioned a few of these in my depositions. If you'd like
10 me to elaborate, I'm happy to do that.

11 Q. Sir, you agree that Google is certainly a big company
12 with a lot of resources, right?

13 A. Yes, of course.

14 Q. And even for Google, there's a lot of money at stake in
15 this case, right?

16 A. I think so.

17 Q. They certainly have a motivation, an incentive to come
18 here and present the jury with definitive evidence that
19 these numbers are wrong, right?

20 A. I -- I think as I said, my understanding is other
21 experts would present some numbers. I was not asked to do
22 that. That's all I know.

23 Q. Google certainly had the time and the resources to
24 carry out its own study of the Android smartphone users,
25 right?

1 A. They could look at the market, sure. Yeah.

2 Q. And they could have had you do that, right?

3 A. Well, as I said, I'm not sure survey is a right thing.

4 They could have done other things, and they might have done
5 other things that I'm not aware of.

6 Q. Do you know whether Google actually did a survey of the
7 Android smartphone users on this issue of how important
8 notifications are?

9 A. You keep coming back to survey. As I said, I'm
10 skeptical survey is the right thing to do. My understanding
11 is that Google might have done other things to look at the
12 market -- what happened to the market when this notification
13 was launched, what happened to prices, what happened to
14 sales.

15 And so -- but I don't have any, you know, direct
16 knowledge of what those -- what they could have done that.

17 Q. As far as you know, sir, Google actually did their own
18 survey, and the numbers came out larger than Dr. Srinivasan,
19 right?

20 A. I have no knowledge of whether Google did a survey or
21 didn't do a survey. So that's all I know.

22 Q. Well, sir, one benefit of Google going out and doing its
23 own survey would be that they could show that the numbers
24 actually come out much, much lower than what Dr.
25 Srinivasan's analysis shows, right?

1 A. I think the survey is problematic, as I said, for many
2 reasons in my deposition. And I said it today why a survey
3 is not appropriate. It doesn't take into account
4 competition. It artificially focuses your attention on 16
5 features as opposed to a hundred features.

6 And then I'm setting aside the instruction flaws that
7 Dr. Srinivasan had, because let's assume that Google could
8 have done a survey and improved on that. So I think the
9 bigger point is I don't think survey is necessarily
10 appropriate, but I take your point that Google should do
11 something to show the valuation of the feature.

12 MR. EICHMANN: Your Honor, I don't mean to be
13 disrespectful, but I have limited time here. Perhaps if the
14 witness could stay a little bit more within the scope of my
15 questions.

16 THE COURT: Well, I'll consider that's an
17 objection as non-responsive, and I'll sustain it. And I'll
18 instruct the witness to answer the questions asked but not
19 stray from the question that's proposed.

20 THE WITNESS: Thank you.

21 Q. (By Mr. Eichmann) Another possibility, sir, would be
22 that Google went out, did its own survey of the Android
23 smartphone users, and the numbers turned out to show Dr.
24 Srinivasan was not only right but he understated the value,
25 right?

- 1 A. Again, I have no knowledge of it.
- 2 Q. Google didn't talk to you about any of that?
- 3 A. Correct.
- 4 Q. Now, we presented Dr. Srinivasan's background and his
- 5 credentials, and you were here for that, right?
- 6 A. Yes, I was.
- 7 Q. And you agree, sir, that he's one of the foremost
- 8 experts in the world in this field of conjoint analysis,
- 9 right?
- 10 A. Correct.
- 11 Q. You don't contend that we've misrepresented him being
- 12 the top five people in this field, right?
- 13 A. Correct.
- 14 Q. In fact, you agreed with me in that when we had your
- 15 deposition?
- 16 A. And I said it. He's a great academic.
- 17 Q. And he's actually more well-known in the field of
- 18 conjoint analysis than yourself, isn't he?
- 19 A. Correct.
- 20 Q. He's published more papers on the subject?
- 21 A. Correct.
- 22 Q. And you've published some papers that touch on the
- 23 subject but none that specifically address conjoint
- 24 analysis, right?
- 25 A. In my research, that's correct.

1 Q. And when Dr. Srinivasan was talking about all the
2 different awards that he received, you're aware that he's
3 received these awards, right?

4 A. I'm sure that if he's listed them, then he's received
5 them. I have no reason to doubt it.

6 Q. And you certainly had heard of him; you're aware of him
7 before this case came along, right?

8 A. Yes, of course.

9 Q. You don't contend that Dr. Srinivasan is biased in
10 SimpleAir's favor or against Google, do you?

11 A. I don't. When you say biased, I think you mean intent.
12 No, I don't, of course.

13 Q. Well, sir, when Dr. Srinivasan sat down to design his
14 study, you agree that he was doing the best that he could,
15 right?

16 A. I -- I would assume so. Yes.

17 Q. You agree that he wasn't sitting down trying to figure
18 out a way to make the survey come out in SimpleAir's favor,
19 right?

20 A. Again, I don't know that, but I would assume not. Yes.

21 Q. He has a very long and distinguished career, right?

22 A. Correct.

23 Q. You don't think that he would risk that career and his
24 representation just to come here for this case and present
25 inflated numbers, right?

1 A. I -- I agree with that.

2 Q. Now, I want to turn to one of your opinions here, which
3 is on your slide. You said that there is no support that
4 when purchasing a smartphone in the real world, consumers
5 considered timeliness of notifications, right?

6 A. That's right.

7 Q. And now you talk about the real world. Dr. Srinivasan's
8 survey occurred in the real world, didn't it?

9 A. Well, it occurred in the real world, but it did not
10 reflect the real world of smartphone purchase.

11 Q. He surveyed real-world users, right?

12 A. But not the entire smartphone features.

13 Q. These were real people, actual people taking the survey,
14 right?

15 A. Oh, yes, but when we say real world, we mean the entire
16 methodology. We don't mean literally that these were real
17 people.

18 Q. And you didn't talk to real people, right?

19 A. As I said, that would not be the proper way to do it.

20 Q. You thought it was the proper way to go about looking at
21 articles and information on the Internet?

22 A. As I said, I looked at the websites for the various
23 companies, what kind of features we were talking about. And
24 then I did a systemic look at many websites to see what came
25 up the highest, and I looked at 53 different websites to get

1 a sort of overall sense of what's being mentioned.

2 Q. And these are what you refer to as third-party reviews?

3 A. That's right, like Consumer Reports and Gadget and so
4 forth.

5 Q. Well, Consumer Reports and Gadget and other people who
6 are commenting on reviewing new products, right?

7 A. Correct.

8 Q. These were not reviews by the actual consumers of the
9 products, right?

10 A. That's correct.

11 Q. Now, in your research, did you have occasion to do a
12 Google search in order to find out how important
13 notifications are?

14 A. When you say Google search, what do you mean -- you mean
15 literally type notification?

16 Q. Well, sir, would it surprise you to know that if you go
17 onto Google and type in Android notifications, you get 295
18 million results?

19 A. Well, I don't know what the 295 million means. When I
20 type my name and I get like a million results, I don't think
21 they're all talking about me. But I think -- I think I
22 mentioned this earlier that a lot of discussion that I found
23 of notification was happening in the software developer
24 websites and all that.

25 And -- but the short answer to your question is I

1 didn't look systemically about what consumers are talking
2 about or notification.

3 Q. Now, the jury is able to disregard both parties'
4 experts. You understand that, right?

5 A. Sure.

6 Q. They can look at the evidence for themselves, right?

7 A. Sure.

8 Q. And one thing they might want to look at would be the
9 records that Google keeps on how many of these notifications
10 are sent out, right?

11 A. Sure.

12 Q. That's not something that you looked at in your report,
13 right?

14 A. That's correct.

15 Q. And Google's records show that there are 14 billion
16 requests for this single day in 2013, right?

17 A. I mean, the data is what it shows.

18 Q. That's a lot of notifications, right?

19 A. Yes.

20 Q. But your contention is that people don't know about the
21 notifications or care about them?

22 A. They don't care about them when they buy the phone.

23 It's not considered. A phone has over a hundred features.

24 Think about yourself when you buy a phone. How many
25 features did you consider when you buy a phone, and how many

1 of you consider all the different features. That's what I'm
2 really looking at.

3 Q. Well, sir, consumers today don't have to consider a
4 phone that has no notifications and one that does, right?

5 A. I think you mean -- if I understand you correctly, you
6 mean because they all might have notifications?

7 Q. Yes, sir.

8 A. Yes. It's possible, yeah.

9 Q. When users go to the store and pick between smartphones,
10 all of them now have the infringing notification feature,
11 right?

12 A. That's my understanding.

13 Q. This study, Dr. Srinivasan's study, is about what if you
14 took the feature out, how would that affect things, right?

15 A. That's right. Looking at the feature if nobody else --
16 what the feature value is. Yes.

17 Q. And, sir, you also said that there's no evidence that
18 consumers are aware that -- that the technology improves
19 battery life, right?

20 A. Right.

21 Q. Now, you understand, sir, that this is what Dr. Knox
22 presented on the improvement in battery life between the
23 infringing notification service and the next best
24 alternative, right?

25 A. Rough -- you know, I saw this version. I don't know who

1 presented it, but I take your word for it.

2 Q. And you understand that a user of the Android operating
3 system, they don't have to understand all the benefits that
4 are -- excuse me -- all the technology that's behind the
5 benefits of what they're getting, right?

6 A. That is correct.

7 Q. The user of the Android phone doesn't have to know about
8 the central broadcast server and how it has one connection
9 to the phone as opposed to multiple, right?

10 A. Right.

11 Q. They can still get the phone, really enjoy the
12 notifications, and not notice the impact on battery that's
13 being saved, right?

14 A. That's not correct. Because if a consumer doesn't know
15 what the benefit of notification is for battery life in the
16 real world, why would you ever pay for it. It's like a
17 restaurant that serves great shrimp, and I love great
18 shrimp, but I would never value that restaurant unless I
19 knew that restaurant serves great shrimp.

20 So I think a consumer, to value this feature in choice,
21 needs to know that this new technology is better for my
22 battery life; otherwise, I won't value it.

23 Q. Well, sir, if the company was forced to charge for the
24 feature, they could also tell the users, hey, this is why
25 you should buy it, because it saves battery life, right?

1 A. They could, but as I said, I didn't see any mention of
2 anyone talking about it. You're right. They could talk
3 about it, but nobody does.

4 Q. And, again, sir, you don't have your own survey of how
5 all these results would come out, if you took Dr. Williams's
6 battery test, instead of Dr. Knox's battery test, right?

7 A. That's correct.

8 Q. Now, you say that Dr. Srinivasan's instructions
9 exaggerate the importance of notifications, right?

10 A. Correct.

11 Q. And you point to this part of his survey, right?

12 A. As one of the reasons, yes, sir.

13 Q. And, sir, you had the ability to access Dr. Srinivasan's
14 survey to take it yourself online, right?

15 A. He provided me all the -- yes.

16 Q. And one thing that you could have done is taken his
17 survey and changed all the parts to it where you think
18 that he exaggerates the importance of notifications,
19 right?

20 A. I wouldn't do the survey -- I mean, that's like
21 rearranging the deck chairs on the Titanic because I have a
22 lot of issues with it. But if you wanted me to do that, I
23 guess I could do that, yeah.

24 Q. And that's not something that you did, right?

25 A. I did not.

1 Q. You don't have any survey results to report to this
2 jury?

3 A. I do not.

4 Q. Thank you.

5 THE COURT: You pass the witness, Mr. Eichmann?

6 MR. EICHMANN: I'm sorry. Yes, I do, Your Honor.

7 THE COURT: Redirect, Ms. Ainsworth?

8 MS. AINSWORTH: Yes, briefly, Your Honor.

9 THE COURT: Proceed.

10 REDIRECT EXAMINATION

11 BY MS. AINSWORTH:

12 Q. Dr. Dhar, I want to ask you about two areas. First, you
13 had some questions from Mr. Eichmann about saying that you
14 didn't talk to real people and you could have contacted
15 people or asked them whether they knew about notifications.
16 And you mentioned that, no, you didn't think that was the
17 right thing to do. Why is it not appropriate to just call
18 up people and ask, do you think notifications are valuable?

19 A. Well, it's just an inappropriate way to do research to,
20 you know, call up a few friends and what they would do. You
21 could -- you know, so that's -- I thought that's what he was
22 asking so that's what I meant here.

23 Q. And Mr. Eichmann asked you twice a question along the
24 lines of, well, for all you know, Google could have done
25 their own survey and that survey turned out to show that

1 notifications were worth much more or the market willingness
2 to pay was much higher than the \$12.23. Have you seen any
3 evidence or information that Google did some survey that
4 came out with a higher number and has not reported it?

5 A. I have no knowledge of anything Google has done on
6 surveys, no.

7 MS. AINSWORTH: No further questions, Your Honor.

8 THE COURT: Additional cross?

9 MR. EICHMANN: No, Your Honor.

10 THE COURT: You may step down, Dr. Dhar.

11 THE WITNESS: Thank you, sir.

12 MS. AINSWORTH: Your Honor, may Dr. Dhar be
13 excused?

14 THE COURT: Is there objection?

15 MR. EICHMANN: No objection. We may call Dr.
16 Srinivasan in rebuttal. I don't know if the Court has any
17 preference for him staying for that.

18 THE COURT: Unless you have an objection -- unless
19 you intend to call him adversely in rebuttal --

20 MR. EICHMANN: No, sir.

21 THE COURT: -- then he'll be excused. You're
22 free to leave or you're free to stay, Dr. Dhar.

23 All right. Defendant, call your next witness.

24 MS. WILLIAMS: Thank you, Your Honor. We call Dr.
25 Keith Ugone.

1 THE COURT: All right. If you'll come forward,
2 Dr. Ugone. You've already been sworn, correct?

3 THE WITNESS: Yes, sir.

4 THE COURT: Please come have a seat.

5 All right. Ms. Williams, you may proceed.

6 MS. WILLIAMS: Thank you, Your Honor.

7 KEITH UGONE, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

8 DIRECT EXAMINATION

9 BY MS. WILLIAMS:

10 Q. Dr. Ugone, will you please introduce yourself to the
11 jury?

12 A. Sure. My name is Keith Raymond Ugone, and my last name
13 is spelled U-g-o-n-e.

14 Q. Dr. Ugone, why are you here today?

15 A. Well, there was a prior trial where Google was found to
16 have infringed the '914 patent, and so I'm here to talk
17 about what the appropriate payment would be for that finding
18 of infringement.

19 Q. Dr. Ugone, is that microphone --

20 A. Well, I'll work -- you can tell me if it's not sounding
21 just right.

22 Q. All right. Thank you. Dr. Ugone, where do you live?

23 A. Actually live in Grand Saline. So if you've ever been
24 to Trade Days by Canton, it's Mile Marker 528 so I live 75
25 miles west of here.

1 Q. How long have you lived in Texas?

2 A. Since 1994.

3 Q. Do you have any children?

4 A. I do. Son No. 1, Kyle, is a Captain in United States
5 Marine Corps, and Son No. 2, Casey, lives with me and goes
6 to University of Texas at Tyler.

7 Q. Dr. Ugone, what do you do for a living?

8 A. So I call myself -- it's a fancy title, but I'm a
9 forensic economist and damage quantifier.

10 Q. All right. So with the fancy title, can you help us
11 understand what that means?

12 A. All right. So, you know, much like what's going on in
13 the courtroom here, it's not uncommon for companies to get
14 into commercial disputes. And so when companies get into
15 commercial disputes, somebody's got to figure it out --
16 figure out kind of what happened because of the alleged
17 wrongful conduct that one side is usually contending the
18 other side did, and somebody's got to figure out what would
19 have happened in the absence of that alleged wrongful
20 conduct. So that's kind of a forensic economics part, so I
21 do that sort of analysis from a financial and economic point
22 of view, forensic economics.

23 And then ultimately I reach a conclusion as to the
24 amount of economic harm and whether a payment should be made
25 as a remedy for that economic harm. And that's the damage

1 quantification part. So I call myself a forensic economist
2 and damage quantifier.

3 Q. Dr. Ugone, before we get into the work that you did
4 specific to this case, can you describe for us your
5 educational background?

6 A. Yes. So I have an undergraduate degree in economics
7 from the University of Notre Dame, which I received in 1977.
8 I have a Master's degree in economics from the University of
9 Southern California, which I received in 1979. And then I
10 have a Ph.D. in economics that I received from Arizona State
11 University in 1983. So that was 10 straight years of
12 college. Not quite sure how I did that.

13 Q. Well, after you finished your 10 straight years of
14 school, did you eventually start working?

15 A. Yes.

16 Q. Can you describe for us what your work history is
17 briefly?

18 A. After I got my Ph.D. in 1983, I taught for a couple of
19 years in one of the California State University system
20 schools -- Cal State Northridge. That's just in the San
21 Fernando Valley, just north of LA. So I did that for a
22 couple of years. And then I joined -- in 1985, I joined
23 PricewaterhouseCoopers -- it was Pricewaterhouse at the
24 time. And there's been some mergers, but I was with that
25 company for about 18 years to the very end of 2003. And

1 then getting into 2004, I joined Analysis Group.

2 Q. What -- now that you're working for Analysis Group, can
3 you -- now that you are working for Analysis Group, can you
4 please tell us what -- what that company is known for?

5 A. Analysis Group does economic, financial, strategy-type
6 consulting services for businesses, for the government, for
7 law firms.

8 Q. Do you specialize in economics and damages-related work?

9 A. Right. So that's -- that's my area of specialization,
10 as I described, and so that's what I -- that's what I do on
11 a day-to-day basis.

12 Q. So is it fair to say that most of your time is spent
13 working in the litigation or dispute setting?

14 A. Yes. So virtually all of my time is in a setting where
15 there's a dispute between companies and somebody has to do
16 either financial or economic analysis, and that's the area I
17 specialize in.

18 Q. Does that mean at times you have to testify in court?

19 A. So if the dispute does not resolve itself, yes, then
20 there's times that I have to come to court to testify.

21 Q. Have you testified in patent cases before?

22 A. I have.

23 Q. Have you testified in this court before?

24 A. Yes, I have.

25 Q. What rate does Analysis Group charge for your time?

1 A. So the company I work for charges \$600 an hour for my
2 time.

3 Q. Dr. Ugone, let's talk about the work that you did for
4 this case specifically. Would you please tell the jury what
5 you were asked to do?

6 A. Well, I was asked to do two things. One, I was asked to
7 independently evaluate the payment that should be made from
8 Google to SimpleAir because of the finding of infringement
9 in the prior trial, so that was sort of one task. And then
10 the other task was to evaluate the numbers that SimpleAir
11 has presented as damages through Mr. Mills' testimony who
12 testified yesterday and today. So I've evaluated Mr. Mills'
13 work, as well.

14 Q. Will you please tell the jury what, if any, documents
15 you reviewed as part of your work on this case?

16 A. Yeah, as you -- as you can imagine, this is a big case,
17 and there's a lot of documents. There's some complicated
18 things going on. So there's legal documents. There's the
19 SimpleAir license agreements that you've heard about.
20 There's the Google license agreements that you've heard
21 about. There's the profit and loss financial statements
22 associated with the Android operating system that you've
23 heard about. So all of those documents are the types of
24 documents that I reviewed in conducting my analysis.

25 Q. Dr. Ugone, it sounds like you and Mr. Mills reviewed

1 some of the same documents?

2 A. Yeah, it's true in a dispute setting that each of the
3 experts has access to the same documents so that's a true
4 statement.

5 Q. Did you speak with anyone while doing your work on this
6 case?

7 A. Yes, I spoke to some people at Google, so Mr. Francesco
8 Nerieri, I spoke to. I also spoke to Dr. Williams who you
9 heard testify. And I spoke to Dr. Dhar who you heard
10 testify, as well. So I spoke to a number of individuals.

11 Q. Did you issue any reports that contains your opinions in
12 this case?

13 A. Yes. So I provided the reports as to my conclusions.

14 Q. Did you testify in the prior trial?

15 A. I did, yes.

16 Q. Have you been in attendance for the -- for the entirety
17 of this second trial?

18 A. Yes, I have.

19 MS. WILLIAMS: Your Honor, at this time, I request
20 that the courtroom be sealed.

21 THE COURT: Is there objection from the
22 Defendant -- excuse me -- the Plaintiff?

23 MR. DOVEL: No, Your Honor.

24 THE COURT: All right. And the Court will seal
25 the courtroom for the record. If you're present and not

1 subject to the current protective order, you should exit the
2 courtroom at this time.

3 (Reporter's Note: At this point in the
4 proceedings the courtroom was sealed. That portion of the
5 testimony is filed under seal; Sealed Portion No. 4 in the
6 3/18/14 PM Session.)

7 (Courtroom unsealed.)

8 THE COURT: You may continue, Mr. Dovel.

9 MR. DOVEL: Thank you.

10 Q. (By Mr. Dovel) Now, one of the things you considered
11 was the subject of non-infringing alternatives, right?

12 A. Yes.

13 Q. And you said, well, Dr. Williams tells me there's this
14 non-infringing alternative. We can just move everything
15 outside of the country, so we're no longer subject to U.S.
16 patent laws, and then it would only cost Google \$4.8 million
17 to do that, right?

18 A. It's a little bit beyond that, but I'll -- I'll accept
19 the spirit of what you're paraphrasing.

20 Q. Thank you. Now, you would agree, sir, that if what Dr.
21 Williams described is not actually a workable alternative,
22 then Google would not do it, right?

23 A. If what Dr. Williams described was not workable for some
24 reason, if you're asking me to make that assumption, then I
25 can make that assumption.

1 Q. All right. If it's the case that this alternative of
2 moving all the servers overseas is not a viable alternative,
3 you would agree that the cost of implementing a
4 non-infringing alternative is not just \$4.8 million, right?

5 A. You're asking me if it's not a viable alternative, so if
6 you're saying that they can't do it for some reason. Is
7 that what you're asking?

8 Q. Yes.

9 A. Okay. So if they can't do it for some reason, then you
10 would take that out of the equation of the economics.

11 Q. There would be no acceptable non-infringing alternative
12 for Google, right?

13 A. I can't speak to that.

14 Q. That's the only one that was identified for you by Dr.
15 Williams, right?

16 A. Yeah. You said something different. So you take this
17 one away. I can't speak to whether there's other ones that
18 exist or not.

19 Q. Well, would you agree, sir, that if Google doesn't have
20 any available non-infringing alternative, if they want to
21 practice the central broadcast server method, if they want
22 to send notifications, there's no other way to do it, then
23 that's going to put SimpleAir in a much better bargaining
24 position than if Google did have alternatives, right?

25 A. It will change the bargaining dynamics in the sense that

1 when I was talking about the real world facts, you would
2 take away that non-infringing alternative part of my
3 discussion.

4 Q. Not just --

5 A. I'm sorry, go ahead.

6 Q. Not just change it. It would mean that Google would --
7 or that SimpleAir would have a much stronger bargaining
8 position?

9 A. I can speak factually the following way: You would take
10 away the non-infringing alternative, but the other
11 negotiating points would still remain.

12 Q. Let's talk about the cost of doing this non-infringing
13 alternative. What you said was \$4.8 million, right?

14 A. Okay. Now, let's be a little careful. This is where I
15 was going with you before and with the spirit, but it's a
16 little bit more complicated. That's the present value of
17 the cost differential over the life of the patent.

18 Q. Okay. The present value over doing it over the life of
19 the patent. And to make that calculation, you assumed that
20 the cost would be 25 percent greater to do it overseas than
21 to keep the servers in the U.S., right?

22 A. That's correct.

23 Q. And that assumption, of course, it's essential to your
24 calculation. If it's not 25 percent, if it's some other
25 number, then it's not 4.8 million. It's some other cost,

1 right?

2 A. That's always true with math. If there's a different
3 input, then the number changes.

4 Q. Well, for example, if it turned out the costs were
5 actually 500 percent more to do all this by moving all the
6 servers overseas, what would that do to your calculation?

7 A. So you would -- that would be -- you'd have to take that
8 differential between the 500 and the 25 percent, so that's
9 20 times, so the number would change by -- by 20 times.

10 Q. That would be 20 times \$4.8 million?

11 A. Roughly, yes.

12 Q. What would that be approximately?

13 A. 20 times 5 -- 20 times 5 would be a hundred million
14 dollars.

15 Q. So, sir, wasn't it -- it was critical for you to find
16 out whether this assumption was true, whether it was
17 actually going to be 25 percent more or 500 percent more or
18 some other number, right?

19 A. That's an input into the calculation, yes.

20 Q. Now, the way you got that input is somebody at Google
21 told you to use that number, right?

22 A. Yes. So I had some inquiries at Google, and I received
23 that -- that input, along with some other information.

24 Q. Well, sir, for that input, that 25 percent number, you
25 didn't see any documentation showing or the supporting that

1 25 percent number, right?

2 A. I didn't receive documentation. I had discussions with
3 someone knowledgeable of what that cost differential would
4 be, and the indication was that there was a 25 percent cost
5 differential.

6 Q. Well, the person you talked to, he didn't provide you
7 with any documentation or -- to show you how he got to 25
8 percent, to show you his calculation, show you his sources
9 of information, any of that, right?

10 A. On -- on the 25 percent. There were some other numbers
11 that I received, but not on the 25 percent.

12 Q. On the 25 percent, you got no documentation, right?

13 A. That's correct.

14 Q. You got no calculations, right?

15 A. I -- the information I got was based on his experience
16 and his knowledge of the systems.

17 Q. Now, sir, did you ask him for his documentation?

18 A. There was discussions I had with him. I don't believe I
19 received any documentation. I don't remember if I asked her
20 (sic) or not, frankly, as I sit here.

21 Q. Did you ask to see his calculations?

22 A. I don't recall ever asking him that question.

23 Q. The truth is, sir, you did absolutely nothing to verify
24 that what this Google person was telling you was true,
25 right?

1 A. That is not -- not correct.

2 Q. Did you do any online search?

3 A. No, no. I'm saying along different dimension. So I did
4 receive some documentation as an input into that
5 calculation, and I also inquired as to this individual
6 and -- you know, his experience to give that sort of
7 opinion.

8 Q. Oh, so it was an opinion he was giving you?

9 A. Well, now -- I don't want to get into the words. It's
10 his estimate as to what that cost differential would be.

11 Q. He was giving you an estimate?

12 A. Yes.

13 Q. It wasn't a calculation, it was a guess?

14 A. No. No, I would not say that.

15 Q. Well, it wasn't -- was it a calculation or not?

16 A. Okay. I received that input from him. That's how I
17 would describe it. So you can use whatever words you want
18 to use, but it was an estimate. And I'll say it was an
19 estimate, that I received it from him, that gives us a
20 relevant range for that -- the cost of the non-infringing
21 alternative.

22 Q. Now, you would agree, sir, that the jury sees no
23 evidence to put on the scale to support that 25 percent,
24 and they've got no basis to accept your
25 4.8-million-dollar number, right?

1 A. Well, they have -- they have the testimony and my
2 explanation of how I derive that number, so I got that
3 number from various inputs where we received information and
4 I talked to people at Google. And the question is if you
5 have to reroute the traffic to a foreign server, what are
6 the likely costs that would increase, including electricity
7 and maintenance and knowing the cost differentials of
8 electricity and maintenance on the foreign servers versus
9 the United States, the input I received is that cost
10 differential is 25 percent.

11 Q. Did you check the cost differentials on electricity for
12 the United States, yes or no?

13 A. No.

14 Q. Did -- once the servers are located in Finland, right?

15 A. One of them -- one server foreign, yes.

16 Q. The electricity costs there are 500 percent of what they
17 are in the U.S., aren't they?

18 A. Okay.

19 Q. Yes or no?

20 A. I -- I can't answer that question because that may not
21 be relevant to the -- to the electricity differential that
22 Google would face in a server farm versus just a
23 residential, so I don't even know -- when you say 500
24 percent, I don't know if you're talking about a residential,
25 commercial, industrial. We all know those rates are

1 different.

2 Q. Now, sir, I want you to assume that Dr. Srinivasan's
3 estimate of the number of users that would be willing to pay
4 \$12.23 is correct -- that is 42 percent -- you assume that
5 is correct?

6 A. Okay.

7 Q. If so, then would you agree that Google's providing
8 notifications for Android phones caused an increase in sales
9 of Android phones?

10 A. I'm going to need that question again.

11 Q. If it's true, Dr. Srinivasan's, he's got it right or
12 approximately right, it's about \$12 and 42 percent would
13 have purchased it, that tells you that adding notifications
14 increased the number of sales of Android phones, right?

15 A. No, I don't -- I don't get that conclusion at all from
16 the predicate you laid out.

17 Q. Well, if you add a feature like with the notifications,
18 it's worth \$12.23. As an economist, you know that's going
19 to increase demand, right?

20 A. If you add a feature that's demanded and you keep the
21 price the same, it's likely you will sell more units, yes.

22 Q. So there's two options. One thing is the price could go
23 up in which case you wouldn't sell more units, right?

24 A. I -- you may. There's times you can increase -- you
25 wouldn't sell as many as you might have otherwise sold, I'll

1 agree to that.

2 Q. But you would agree if the price stayed the same --
3 phone prices generally stayed the same, then that would tell
4 you that a market willingness to pay \$12.23 means that the
5 notification feature resulted in more phones sold -- more
6 Android phones, right?

7 A. I don't think you can just categorically say that.

8 Q. Well, sir, if we add a feature that increases the value
9 of the phones, right, all other things equal, that's going
10 to tell us that if prices stay the same, more phones are
11 sold, right?

12 A. Okay. If -- if we're just going to stay with a
13 hypothetical, as opposed to the facts of this case and some
14 of the disagreements, generally speaking, if you add a
15 feature, that may cause more people to want to buy the item,
16 especially if the price is staying the same.

17 Now, I'll agree with that conceptionally. The
18 disagreement comes in when we talk about the facts of this
19 case.

20 Q. Well, in the facts of this case, you did a study and
21 determined, in fact, phone prices did not go up -- Android
22 phone prices stayed the same or went down a little bit,
23 right?

24 A. So, yes. So I looked at an HTC EVO phone before the --
25 the alleged -- or the infringement, then I looked after,

1 when the Android operating system had that feature and the
2 phone prices were the same. So we did not see phone prices
3 increase, which Mr. Mills said that he expected would have
4 happened if it was valued to the feature.

5 Q. Well, didn't what Mr. Mills say is that either the price
6 would increase or if the price stayed the same, more phones
7 would be sold, right?

8 A. But he did say he would have expected the value of the
9 phone to increase by the \$12.23. I thought I recall that.

10 Q. If the value of the phone increased and price stayed the
11 same, that means you're going to sell more phones, right?

12 A. If the -- say that again.

13 Q. If the value of the phone increases by \$12 and the price
14 stays the same, you're going to sell more phones, right?

15 A. Assuming that and holding everything else constant, you
16 may see an increase in the number of phones, but we know
17 phones are -- have a lot more attributes, but I don't
18 disagree conceptionally with what you're saying.

19 Q. You did analysis to determine what happened in the
20 one-year period before notifications and what happened in
21 the one year after with respect to Android phones, right?

22 A. Actually I think, as the jury can see, you cut this in
23 half. I didn't do it with respect to Android. I did it
24 with respect to Android and Apple, RIM, and there was one
25 other, Microsoft operating system. So I actually had four

1 sets of two bars. You've cut it off.

2 Q. Right. You've looked at all four of them, right?

3 A. Yes.

4 Q. This is -- this is what you did for Android, right?

5 A. Yes, but you're -- you're distorting, frankly, the
6 analysis that I did. I don't mean anything by that, but
7 this is not the analysis I did.

8 Q. What you've got here is the sum total of the analysis
9 you did for Android, right?

10 A. You're taking it out of context.

11 Q. All right. You put it in the context of Apple and RIM
12 and -- and Microsoft, right?

13 A. Yes.

14 Q. I'll get to that context.

15 A. Sure.

16 Q. Okay. Let's talk about Android first, okay?

17 A. Okay.

18 Q. Now, if we talk about Android, when you did your
19 analysis, you -- you looked at the period before the
20 infringing service was intro -- introduced and you
21 discovered that Android's market share in terms of phones in
22 the U.S. was what?

23 A. That was the 15.8 percent.

24 Q. And after the infringing feature was introduced, what
25 happened to Android's market share?

1 A. Okay. You're drawing a correlation that is not
2 accurate, but factually speaking, the 51 percent is higher
3 than the 15.8. You're drawing the correlation to just push
4 notification. And I tried to explain to the jury that
5 Android had all those changes in the operating system, the
6 increased versions, all the new features, that's what's
7 explained this. That's the rest of the chart you're not
8 showing demonstrates.

9 Q. Well, the rest of the chart shows that Apple and
10 Microsoft didn't get as much benefit from the notifications
11 feature, right?

12 A. Well, no. What it -- no, I disagree. I can explain,
13 but I disagree.

14 Q. All right. Well, let's talk about the market
15 willingness to pay, what that tells us. If Dr. Srinivasan's
16 numbers are right, then Mr. Mills' calculation -- you don't
17 disagree with it. That means that Google got an additional
18 \$600 million in profits, right?

19 A. I'm struggling a little bit because I think you just
20 asked me to do math again. I don't -- I don't agree with
21 the \$12.23, but if you said assume \$12.23 and then do some
22 math and here's a number, I'm not going to disagree with the
23 math, but I disagree with the economics.

24 Q. You disagree with -- starting with the 12.23. That's
25 one thing you disagree with, right?

1 A. I disagree with the \$12.23, yes, and I disagree that
2 that's a driver of sales.

3 Q. But you haven't seen any other analysis presented that
4 tells us what the market willingness to pay is for the
5 notification service, right?

6 A. I have seen discussion that the number would be less, if
7 there was a number at all.

8 Q. Would you agree, sir, that if it were the case that in
9 this negotiation -- by the way, the negotiation -- Mr.
10 Payne's going to be on one side, right?

11 A. Either him or a representative of SimpleAir, yes.

12 Q. Who's going to be on the other?

13 A. Either Google or a representative of Google. Is that
14 what you're asking?

15 Q. Yeah. What's the name of that person?

16 A. It would be whoever does the negotiating for Google.

17 Q. In your investigation, did you talk to the person who
18 does the negotiation for Google?

19 A. No, I did not.

20 Q. Did you make any assessment of whether Mr. Payne would
21 be a better negotiator than that person?

22 A. I have not looked at the individuals. I looked at the
23 data that the companies would use. Google is a very
24 sophisticated company that has people that are very skilled,
25 and they're very prudent licensees and licensors. And I

1 made the same assumption about Mr. Payne, that both of them
2 would be prudent negotiators.

3 Q. Would you agree, sir, that in this negotiation between
4 Mr. Payne and Mr. or Mrs. Anonymous, that if SimpleAir
5 established to Google's satisfaction that it was going to
6 lose \$600 million in additional profits, profits that it
7 couldn't get any other way without this license, SimpleAir
8 will be in a much stronger position than if they're only
9 talking about four or \$5 million, right?

10 A. If you're saying that in one negotiation there's only 5
11 million at risk and another one there's 600 million at risk,
12 that would change the dynamics. I'm not going to disagree
13 with that.

14 Q. If there's \$600 million at risk and no non-infringing
15 alternatives, that means Google will risk losing \$600
16 million in bottom line profits without that license, right?

17 A. That in a sense is tautological, but that doesn't mean
18 that they would pay \$600 million when you look at the other
19 value indicators.

20 Q. By tautological, you mean true, yes?

21 A. No. What I mean is that you're assuming that they would
22 have an amount equal to what you're saying. That's what I
23 meant by that.

24 Q. Let's get an answer to the question.

25 THE COURT: Let's approach the bench, first.

1 Counsel, approach the bench.

2 (Bench conference.)

3 THE COURT: I just want to put the parties on
4 notice that as of right now, the Plaintiff has 10 minutes
5 remaining and the Defendant has 15.

6 MS. WILLIAMS: Yes, Your Honor.

7 THE COURT: All right. Let's go.

8 (Bench conference concluded.)

9 THE COURT: All right. Let's continue.

10 Q. (By Mr. Dovel) If Google stands to lose \$600 million, if
11 it doesn't have a license, and it has no non-infringing
12 alternatives, that means the only way to get that 600
13 million is with a license, right?

14 A. If you're saying to use a certain technology and there's
15 no alternatives, then they would need a license to use that
16 technology. That doesn't mean that they couldn't make other
17 business decisions, but I will agree with you. If they want
18 to use that technology, then they would need a license. I
19 will agree with that.

20 MR. DOVEL: Your Honor, I'll pass the witness.

21 THE COURT: Additional direct?

22 MS. WILLIAMS: Yes, Your Honor.

23 THE COURT: Proceed. You may proceed, Ms.
24 Williams.

25 MS. WILLIAMS: Thank you, Your Honor.

1 REDIRECT EXAMINATION

2 BY MS. WILLIAMS:

3 Q. Dr. Ugone, Mr. Dovel showed you a bar chart that showed
4 Android market percentages.

5 A. That's correct.

6 Q. Do you recall that?

7 A. I do.

8 Q. Let's look at your Slide 8. And what does this tell you
9 about what caused that increase?

10 A. Right. So it tells me two things. Like I previously
11 testified, Google comes out with updated versions of
12 Android, the operating system. We see Froyo; we see
13 Gingerbread, Honeycomb, Ice Cream Sandwich, and Jelly Bean.
14 And it's just not the mere fact they're coming out with
15 increased or updated versions. They're coming out with new
16 capabilities, new features, some of just a small amount of
17 which we've shown in this chart.

18 So you can't draw this inference that just push
19 notification caused that increase in share of handsets in
20 that one chart that it cut off that he was trying to show.
21 What he wasn't bringing into the analysis is everything that
22 Google's doing to achieve that higher share, which is coming
23 out with these updated versions of the operating system that
24 handset-makers and consumers find to be good-quality
25 products.

1 Q. Dr. Ugone, do you recall when Mr. Dovel asked you a
2 series of questions about the comparable agreements --
3 excuse me -- Google's comparable license agreements?

4 A. Yes.

5 Q. And you indicated that you had an explanation. What is
6 your explanation?

7 A. Yeah. So I'm trying to remember back to why I said
8 that, but there was the -- there was this sort of
9 extent-of-use issue, and Google found it in their best
10 interest to purchase certain patents for 5.5 million,
11 license other patents for 400,000.

12 And what you have to remember is Google is a high-tech
13 company. And what are they doing? They always have R&D.
14 They always have innovative ideas and new products. So what
15 that type of company does will enter into license
16 agreements. And even if they're not using the technology
17 today, they want to have that available so when they get an
18 idea, they can take that off the shelf and put it into a
19 product and not have to worry about now do I have to go back
20 and get a license. So that's sort of Item No. 1.

21 And then I've also seen some clauses in some of the
22 other license agreements, and we were talking about Apple
23 where it wasn't talking about the extent of use. It just
24 said that Apple can use this in any product they want.

25 Well, that's completely -- any Apple product. That's

1 completely analogous to what I was saying of Google's use.
2 So that's an important consideration as well.

3 Q. Dr. Ugone, as part of your work on this case, did you
4 look at actual phone prices?

5 A. Yes.

6 Q. And can you tell us what is shown up here on the screen?

7 A. Yes. So this is what I was describing to the jury, that
8 if you look at handroid -- Android handset, the HTC EVO 4G,
9 the handset price was \$199.99 before the release of one of
10 the accused Android operating systems. And then after the
11 release of one of the accused Android operating systems, if
12 you keep going along the yellow there, it still was \$199.99.
13 Now, that was prices on an HTC model. It wasn't Google
14 saying we're going to keep the prices the same. This was an
15 HTC model, and the prices stayed the same. When there was
16 that additional push notification feature, we did not see
17 the price of that phone go up.

18 MS. WILLIAMS: Pass the witness, Your Honor.

19 THE COURT: Additional cross?

20 MR. DOVEL: Nothing further, Your Honor.

21 THE COURT: All right. You may step down, Dr.
22 Ugone.

23 MS. WILLIAMS: Your Honor, may Dr. Ugone be
24 excused?

25 THE COURT: Any objection from the Plaintiff?

1 MR. DOVEL: No objection, Your Honor.

2 THE COURT: You may be excused, Dr. Ugone.

3 THE WITNESS: Thank you.

4 THE COURT: You're welcome to stay or you're free
5 to leave.

6 Defendant, call your next witness.

7 MR. STOCKWELL: Your Honor, Google rests.

8 THE COURT: All right. Does the Plaintiff have a
9 rebuttal case to put on?

10 || MR. EICHMANN: Yes, Your Honor.

THE COURT: Call your first rebuttal witness.

12 MR. EICHMANN: Your Honor, we'd like to recall Dr.
13 James Knox.

14 THE COURT: Dr. Knox, I remind you, you remain
15 under oath.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: Please have a seat.

18 JAMES KNOX, Ph.D., PLAINTIFF'S WITNESS, PREVIOUSLY

19 SWORN

20 DIRECT EXAMINATION

21 BY MR. EICHMANN:

Q. Dr. Knox, I want to address one issue that came up when their technical expert testified. You were here for his testimony?

25 A. Yes, I was.

1 Q. And I'm talking about Mr. Tim Williams.

2 A. Yes.

3 Q. He was talking about your battery testing, and he had
4 certain criticisms. Do you recall that testimony?

5 A. I do.

6 Q. And he also made that -- those criticisms in the last
7 trial as well.

8 A. That's correct.

9 Q. None of his criticisms that -- the central one was that
10 you did your testing and used the battery standby time for
11 the phones; is that right?

12 A. That's correct.

13 Q. And what do you recall his criticism being about that?

14 A. He felt that that wasn't representative or a useful
15 number because of other things that the phone is capable of
16 doing.

17 Q. And what's your response to that?

18 A. Battery standby time is something that is published for
19 the phones. It's part of the sales literature to advertise
20 them. Google has a team which studies increasing the
21 battery life, including by use of this infringing
22 technology. They have published papers on it internally.

23 They have also presented those papers to their own
24 application developers and urged them to use this technology
25 in order to save battery life.

1 Q. This is Exhibit 54. This is one of the Google documents
2 that you considered in this case; is that right?

3 A. Yes, that's correct.

4 Q. And you'll see there's a reference here at the top to
5 Francesco's T-Mobile Galaxy Nexus. Do you know who
6 Francesco is?

7 A. Yes. He's one of the people who's testified in this
8 case before from Google.

9 Q. Is he the one that runs the infringing Google service?

10 A. He's on that team. I don't know if he runs it or not.

11 Q. And what is shown here in this internal Google document?

12 A. These are the -- some of the benefits, less wakeups,
13 extra standby. I think that's supposed to say minutes.

14 Q. And when Google does its own internal testing about
15 battery -- battery life, does it use battery standby time as
16 the -- the baseline to measure?

17 A. According to all the documents I've seen, yes.

18 Q. Including this one here?

19 A. Yes.

20 Q. Thank you, Dr. Knox.

21 MR. EICHMANN: Pass the witness.

22 THE COURT: Cross-examination?

23 MR. STOCKWELL: No, Your Honor.

24 THE COURT: You may step down, Dr. Knox.

25 THE WITNESS: Thank you.

1 THE COURT: Plaintiff have any additional rebuttal
2 case?

3 MR. EICHMANN: Mr. Dovel was going to recall Dr.
4 Srinivasan. Plaintiff recalls Dr. Srinivasan.

5 THE COURT: All right. Dr. Srinivasan, I remind
6 you, you're also under oath again.

7 THE WITNESS: Indeed.

8 THE COURT: Please have a seat, sir.

9 You have six minutes, Mr. Dovel.

10 MR. DOVEL: Thank you.

11 SEENU SRINIVASAN, Ph.D., PLAINTIFF'S WITNESS,

12 PREVIOUSLY SWORN

13 DIRECT EXAMINATION

14 BY MR. DOVEL:

15 Q. Dr. Srinivasan, I've placed on the screen a summary
16 slide from Dr. Dhar. We've got limited time, so I just
17 wanted to ask you about one or two of these.

18 One of his criticisms is that the -- your instructions
19 exaggerate the importance of timeliness. Do you agree that
20 that -- with that criticism?

21 A. I do not.

22 Q. Why is that?

23 A. Because I asked people to compare notifications to all
24 other attributes, and people could have easily said -- I
25 mean, respondents could have easily said that this is not

1 important. You recall the -- the two bars they were showing
2 yesterday and somebody could have pushed the bar all the way
3 to zero in which case notifications is not important -- so
4 there's no exaggeration, in my opinion.

5 Q. What about the criticism that the formula fails to
6 consider competition in the marketplace, competition
7 drives down prices? Do you agree with this criticism?

8 A. I don't.

9 Q. Why is that?

10 A. Because competition is definitely true; that part of it,
11 I agree. But if you want to take into account competition,
12 you should not take into account competition only in prices,
13 but you should also take into account competitions because,
14 in the smartphone market particularly, people are constantly
15 introducing new features.

16 So you have to take into account competition in
17 features as well as prices, and there's no technology
18 currently available to find out what the competitive equal,
19 as we call it, would be, if you take into account all of
20 those.

21 Q. Now, the -- in doing conjoint analysis in the real
22 world, do real-world companies in order to predict their
23 actual profits in unit sales make use of the Formula 14 or
24 similar versions of it?

25 A. Yes.

1 Q. Now, the middle criticism here is that there's no
2 support that when purchasing a smartphone in the real world,
3 consumers consider timeliness and so on. He's criticizing
4 that your approach doesn't model actual real-world
5 decision-making.

6 Do you agree with that criticism?

7 A. I don't.

8 Q. Why is that?

9 A. There are actually two parts to this criticism. One of
10 them has to do with considering the timeliness of
11 notification. In my data, which I provided, I show that 14
12 percent of my respondents consider timeliness of
13 notification at least average in terms of importance of the
14 16 features; that is, it is at least 8 times higher or
15 better, higher in terms of importance.

16 So there are clearly people who think notification is
17 quite very important. That is one.

18 Secondly, it is not so much that customers are in
19 question of the battery life. It is not something that
20 customers currently are familiar with, whether this
21 technology will affect battery life or not.

22 What is really important is what could have happened?
23 If Google did not use this system, what would have happened
24 then? Then they would have to connect all applications one
25 by one to the particular smartphone in which case the

1 battery life would be much less, and people will immediately
2 notice that battery life has gone down, because they are not
3 using the infringing system.

4 MR. DOVEL: Your Honor, we'll pass the witness.

5 THE COURT: Is there cross-examination for the
6 Defendant?

7 MR. STOCKWELL: No, Your Honor.

8 THE COURT: You may step down, Dr. Srinivasan.

9 THE WITNESS: Thank you.

10 THE COURT: Plaintiff, call your next rebuttal
11 witness.

12 MR. EICHMANN: Your Honor, we recall Robert Mills.

13 THE COURT: Same admonition, Mr. Mills, you remain
14 under oath.

15 THE WITNESS: Thank you.

16 THE COURT: Please have a seat.

17 ROBERT MILLS, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

18 DIRECT EXAMINATION

19 BY MR. EICHMANN:

20 Q. Mr. Mills, there's been further talk by Google and their
21 experts about the notification being an app and that it's
22 too expensive if you use this model.

23 I ask you again, is the infringing service an app that
24 people are supposed to buy for \$12.00?

25 A. No. The infringing service is something that comes on

1 the Android platform.

2 Q. Is the infringing service at issue in this case
3 something that can provide notifications for all of those
4 60,000 applications that use the infringing service?

5 A. That's right. Yes.

6 Q. When you addressed the Microsoft settlement agreement,
7 which was Exhibit 295, did you make a further adjustment for
8 the fact that Microsoft disputed infringement of the patent?

9 A. No, I didn't adjust for that. That would tend to have
10 an upward impact in terms of comparing it to Google, because
11 as -- as I mentioned during my testimony, when there's
12 uncertainty concerning validity and infringement, that has a
13 downward pressure.

14 And here we know that the patent is valid and infringed
15 by Google.

16 Q. There's also been a lot of talk about worldwide
17 notification numbers versus U.S. If we assume that Google's
18 numbers are correct about the percentage of notifications
19 that are within the United States as opposed to worldwide,
20 do we have to adjust in any way your damages calculations?

21 A. No. In my view, we don't, because I'm still comparing
22 apples to apples. I'm looking at Microsoft's worldwide
23 notifications and comparing them to Google's worldwide
24 notifications.

25 Q. And when you also gave the number for the cumulative

1 notifications sent by Apple, was that also worldwide?

2 A. Yes.

3 Q. Each of these companies -- Apple, Microsoft, Google --
4 they all have services that are worldwide, not just in the
5 U.S., right?

6 A. That's right. They have operations that extend far
7 beyond the United States.

8 Q. It's not just Google that has some of these servers
9 overseas, right?

10 A. That's my understanding. Yes.

11 MR. EICHMANN: Thank you, Your Honor. Pass the
12 witness.

13 THE COURT: Pass the witness.

14 Is there cross-examination?

15 MS. WILLIAMS: No, Your Honor. Thank you.

16 THE COURT: You may step down, Mr. Mills.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: Do you have anyone else to call?

19 MR. EICHMANN: No, Your Honor.

20 THE COURT: Does the Plaintiff rest its rebuttal
21 case?

22 MR. EICHMANN: Plaintiff rests its rebuttal case,
23 subject to the admission of our exhibits.

24 THE COURT: All right. Ladies and gentlemen, the
25 parties have rested, which means that you heard all the

1 evidence that you're going to hear in this case. That
2 brings us to a point where there are certain matters I need
3 to take up with counsel outside of your presence, and all of
4 this translates to what I hope you'll view as good news.
5 You get to go home early today, and you don't have to be
6 back as early tomorrow morning as you were today. I'm going
7 to ask you to be back in the jury room ready to go by 10:00
8 o'clock in the morning. So you get a late start in the
9 morning, and you get off early today.

10 I remind you as you leave today to leave your
11 notebooks on the table in the jury room, and I -- I
12 especially remind you not to discuss the case with anyone in
13 any way, including each other. We're coming to a critical
14 point where you'll receive my final instructions and hear
15 closing arguments from the attorneys tomorrow. And then I
16 will direct you to retire and to deliberate upon your
17 verdict.

18 Then and only then should you and must you discuss
19 the case amongst yourselves. So I remind you as you go home
20 tonight, keep those instructions and all of my instructions
21 in mind. Have a safe trip home, and we will see you back by
22 10:00 o'clock in the morning. You're excused at this time.

23 COURT SECURITY OFFICER: All rise.

24 (Jury out.)

25 THE COURT: Be seated, please.

1 Does the Plaintiff have any motion to offer under
2 Rule 50(a)?

3 MR. DOVEL: No, Your Honor.

4 THE COURT: Does the Defendant have a motion to
5 offer under Rule 50(a)?

6 MR. STOCKWELL: Yes, Your Honor.

7 THE COURT: All right. Proceed, Mr. Stockwell.

8 MR. STOCKWELL: Your Honor, we would move for
9 judgment as a matter of law on the issue of damages. If
10 you'd give me just a minute, Your Honor.

11 So first off, Your Honor, we have previously
12 briefed this in connection with the prior trial, and just
13 for the record, we'd like to incorporate those prior
14 motions, Document Nos. 593 and 638.

15 The general theories on which we move for JMOL is
16 that the royalties in this case include an evaluation that
17 includes noninfringing worldwide information. And I want to
18 pick up where Mr. Mills left off, Your Honor, because at the
19 pre-trial conference in this case, you expressly warned the
20 Plaintiff that they had to -- they had the burden of
21 apportioning for U.S.

22 And what we heard was Mr. Mills say, well, I
23 compared worldwide Google to worldwide Microsoft. Assume
24 for the moment that Google had 40 worldwide messages and --
25 or 400 worldwide messages and Microsoft had 10. If the --

1 the Microsoft messages, if those 10 messages were all in the
2 U.S. and Google's messages, there were only 10 percent that
3 were in the U.S., you would have something like four over 10
4 or 40 percent.

5 If the Microsoft messages, if there's only one
6 that's in the U.S., you would obviously have a larger
7 proportion. Either way, we don't know because of the
8 Microsoft -- because of Mr. Mills' inability to determine
9 what the Microsoft U.S. messages were relative to the
10 worldwide, they can't get to that apportionment.

11 THE COURT: If you'd move just a little bit away
12 from the microphone, Mr. Stockwell, I'd hear you better.

13 MR. STOCKWELL: Thank you, Your Honor. I'm sorry.

14 THE COURT: I'm getting a feedback.

15 MR. STOCKWELL: I have a tendency to lean in.
16 So our contention is you can't simply do a worldwide to
17 worldwide and say, well, that's apples to apples,
18 particularly where there was evidence in this case that
19 Google's U.S. messages were only 193 million, which Mr.
20 Mills ignored.

21 Your Honor, we also addressed in our papers before
22 SimpleAir's licensing of the '914 patent. We don't think
23 the Plaintiff has -- Plaintiff's theories have adequately
24 taken into account the other 12 licenses. They only relied
25 on the Microsoft license and the Srinivasan theory. And we

1 believe that the damages theory under the Srinivasan theory
2 bears no relationship to Google's actual use.

3 You heard Mr. Mills say that he's basing it on
4 Android phones sold by third parties that are capable of
5 infringing. And we cited case law to the Court, the Cardiac
6 Pacemakers' case and the other cases, that say, you can't
7 base a royalty in a method claim -- and this was an en banc
8 Federal Circuit case, Your Honor, on capable -- capabilities
9 of using -- you actually have to use.

10 We think in light of that law, Your Honor, at
11 minimum, that theory has to be stricken and the jury has to
12 be instructed to disregard that theory. It's legally infirm
13 under the Cardiac Pacemakers' case, the en banc case.

14 Your Honor, we also pointed out in our papers
15 various other grounds, the failure to account for the
16 noninfringing alternative, the fact that Dr. Srinivasan's
17 damages testimony should be stricken, and Dr. Mills'
18 testimony should be stricken pursuant to the Daubert motions
19 we filed earlier.

20 We understand that the Court denied that at
21 pre-trial, but we would renew those motions and believe that
22 if the Court struck those, there would be insufficient
23 evidence for the damages figures that are set forth.

24 Your Honor, I can elaborate on any of these, but
25 as I said, these are briefed in the papers before. If the

1 Court wishes to hear more about the damages JMOL motion and
2 the grounds therefore, I'm happy to continue.

3 THE COURT: The Court's aware of your briefing,
4 Counsel. If you'd like to re-file the same or supplemented
5 briefing, you have leave to do so.

6 MR. STOCKWELL: Thank you, Your Honor.

7 THE COURT: Let me hear a response from the
8 Plaintiff.

9 MR. EICHMANN: Your Honor, we oppose and we
10 assert the same reasoning and evidence submitted in Docket
11 No. 632 and 695.

12 With respect to the issue of apportionment, Mr.
13 Mills testified that it is reasonable as one factor within
14 his comparison of the Microsoft agreement to consider the
15 relative numbers of notifications that Microsoft sent
16 through its system and that Google sent through its. He
17 provided that testimony at the last trial, he provided that
18 testimony in deposition, and in his supplemental report
19 served last year.

20 They served a responsive report from Dr. Ugone.
21 He didn't even address that issue. He didn't even take
22 issue with comparing worldwide-to-worldwide as a proxy. As
23 we've explained in our papers, these companies are all
24 worldwide operating, they are all using notifications
25 worldwide, and so that is a relevant comparison.

1 If there were a problem with this analysis, they
2 would have pointed to evidence or some reasoning, not just
3 attorney argument, from their expert saying, wait a minute,
4 we actually know and there is evidence here that it's not
5 rely upon worldwide-to-worldwide as a proxy is, but there is
6 no evidence of that, and we have Dr. -- Mr. Mills' evidence
7 that it is reasonable to rely upon it.

8 Furthermore, the Court did note at the pre-trial
9 conference that there needs to be an apportionment with
10 respect to U.S. and outside infringement. And at every step
11 of the case, we've been very careful to do what the Court
12 says we need to do. Point out when we're talking about
13 worldwide numbers and when we're talking about U.S. numbers,
14 and Dr. Knox specifically considered all of the information
15 that they presented through their witness and in discovery
16 about what percentage are U.S. versus outside and said that
17 his conclusion in reviewing that evidence was several
18 hundred million, if not billions, of infringements in the
19 U.S. per day. Mr. Mills relied upon that in forming his
20 opinions. And the evidence is sound on this perspective.
21 With respect to the apportionment, as well, that has only to
22 do with the analysis under the -- of the settlement
23 agreements. That's the second approach that Mr. Mills
24 provided. That doesn't affect in any way the first theory
25 that was provided under Georgia-Pacific because that

1 comparison was not something that was made.

2 Now, with respect to the Cardiac Pacemakers' case,
3 we'll address this more in our briefing, but the primary
4 issue there is one that comes up in many cases where you
5 can't just simply sell software and say, well, that
6 software, once it gets in the hands of the user, it's going
7 to be able to cause a direct infringement. You can have a
8 contributory infringement case based on that, but it's not
9 infringement to sell software that can then be used to
10 practice a method.

11 Not at all what is happening here. What is
12 happening here is they are infringing, and we are basing our
13 case on their infringement. And Mr. Mills' testimony is
14 that the way they would have decided damages in this case at
15 the hypothetical negotiation is not to have a per message
16 rate but to look at the number of users of the service, and
17 the way to look at the number of users is how many of these
18 devices are out there with the infringing notification
19 feature.

20 Now, why are all of the phones included in there
21 even when some of them are not actually being used for
22 notifications, that's because as we explained, Dr.
23 Srinivasan's analysis takes into account that for some
24 people, notifications has zero value. So if we had a
25 royalty base of two phones and we had two users out there

1 and one says, I don't care anything about notifications, I
2 wouldn't pay for it at all, his phone gets zero. If we have
3 another user out there that says, I'll pay \$24.00 for this
4 phone, he gets 24. The average is the \$12.00 per phone, the
5 starting point for Dr. Srinivasan's analysis, that all gets
6 accounted for, and then it's further cut down because we
7 take the take rate and say, okay, even if you charge for it,
8 only 42 percent would get it.

9 So we can certainly supplement our papers on this,
10 but we don't think there's any issue for either of Mr.
11 Mills' theories or for Dr. Srinivasan's under -- underlying
12 analysis.

13 THE COURT: Well, I'll grant the Plaintiff the
14 same leave to file its prior briefing or to supplement its
15 prior briefing in this regard.

16 Based on the argument, the Court's familiarity
17 with the earlier assertions along the same lines, the Court
18 denies the Defendants' motion under Rule 50(a). This denial
19 doesn't limit or hinder the Defendants' ability under the
20 rules to reurge the motion post-verdict.

21 I remind counsel that they have 20 minutes per
22 side for closing tomorrow. I intend to hold an informal
23 charge conference in chambers in about 20 minutes. We'll
24 say 20 minutes until 5:00.

25 If you are counsel in the case that are going to

1 be arguing tomorrow and your presence is not needed from
2 your trial team to discuss the charge, you're not required
3 to be in the informal charge conference.

4 Also, I will and do now here release the witnesses
5 from their attendance. They're welcome to be here tomorrow,
6 but they're not required to be.

7 And with that, we stand in recess. And I will see
8 you in chambers in about 20 minutes.

9 COURT SECURITY OFFICER: All rise.

10 (Court adjourned.)

11 *****

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15 CERTIFICATION

16

17 I HEREBY CERTIFY that the foregoing is a true
18 and correct transcript from the stenographic notes of the
19 proceedings in the above-entitled matter to the best of my
20 ability.

21

22

23

24 /s/ Shelly Holmes _____
25 SHELLY HOLMES, CSR
 Official Court Reporter
 State of Texas No.: 7804

3/18/14

Date

1 Expiration Date 12/31/14

2

3 /s/ Susan Simmons

SUSAN SIMMONS, CSR

4 Deputy Court Reporter

5 State of Texas No.: 267

Expiration Date 12/31/14

3/18/14

Date

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